

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2025

To be argued by
PETER A. CLARK

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-2025

GLENN DeLaMOTTE,

Appellant,

—v.—

CHARLES E. FENTON, Warden Federal Correctional
Institution,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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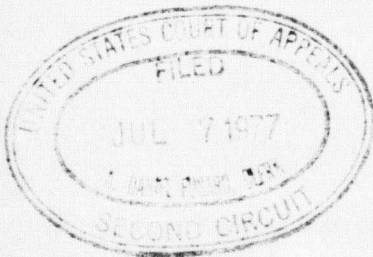


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BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an order of the District Court (Zampano, J.) filed January 10, 1977, dismissing Appellant's motion for vacation of conviction made pursuant to 28 U.S.C. § 2255, which motion was filed on November 2, 1976. Appellant was convicted after a jury in the District of Connecticut (Timbers, J.) on April 16, 1969, of Interstate Transportation of a Kidnapped Person [18 U.S.C. § 1201(a)] and Interstate Transportation of a Stolen Motor Vehicle [18 U.S.C. § 2312]. He was sentenced on May 12, 1969 to concurrent terms, respectively, of thirty and five years.

The convictions were affirmed on November 10, 1970. *United States v. Glen Walter Alexander DeLaMotte*, 434 F.2d 289 (2d Cir. 1970) and certiorari was denied on February 2, 1971, *Glen DeLaMotte v. United States*, 401 U.S. 921 (1971).

On March 22, 1971, Appellant filed a pro se motion for a new trial on a claim of newly discovered evidence. Counsel was appointed on October 1, 1971, and evidentiary hearings were held on June 14, 1972 and March 6, 1973. Appellant waited until August 8, 1975 to file a brief on his motion, at which time he expanded his claims by alleging under 28 U.S.C. § 2255 that hearsay was improperly used at the grand jury which indicted him. The substituted motion was denied in all respects by the District Court on June 1, 1976.

DeLaMotte appealed this denial, which was affirmed on January 26, 1977 under docket number 76-1330.

While that appeal was pending, oral argument having been held on October 27, 1976, DeLaMotte filed the instant motion in the District Court raising once again the same essential grand jury claim then under consideration by the Court of Appeals. The motion was denied in a memorandum of decision dated January 7, 1977. A Notice of Appeal was filed February 4, 1977, along with a motion for reconsideration pursuant to Rule 60(b), Federal Rules of Civil Procedure, which motion was denied on February 22, 1977.

Statute Involved

Title 28, United States Code, Section 2255.

Questions Presented

- I. Whether under 28 U.S.C. § 2255 an assertion of improper use of hearsay before the grand jury is a cognizable claim.
- II. Whether, assuming arguendo that DeLaMotte's claim of grand jury impropriety is cognizable

under 28 U.S.C. § 2255, it is now procedurally barred because previously raised and rejected.

- III. Whether, assuming *arguendo* that DeLaMotte's claim of grand jury impropriety is properly before this court, he has made the requisite showing that the grand jury was misled concerning hearsay testimony.

Statement of Facts

The facts underlying DeLaMotte's offenses are summarized in the decision on his direct appeal, *United States v. Glen Walter Alexander DeLaMotte, supra*, and in the memorandum of decision filed by Judge Zampano in the instant motion. They are not pertinent to the issues at bar. The facts with respect to the grand jury claim were incorporated in the files and records of docket number 76-1330. In essence, an F.B.I. agent testified at the grand jury relating the confessions of two accomplices that implicated DeLaMotte. One of the accomplices, Jackson, later testified at DeLaMotte's trial and provided the bulk of the Government's evidence resulting in DeLaMotte's convictions.

ARGUMENT

I.

The court has already ruled that Appellant's claim of grand jury impropriety need not be considered under 28 U.S.C. § 2255.

In the order affirming the denial of DeLaMotte's first motion for a new trial (Docket No. 76-1330), this Court found no error in the District Court's rejection of Appellant's claim of grand jury impropriety, citing *Davis v.*

United States, 417 U.S. 331, 346 (1974). The import of reliance on that authority is that the error asserted by Appellant need not be considered on the merits in a motion made pursuant to 28 U.S.C. § 2255. The District Court was therefore entitled to simply reject the petition on that basis, although it went further in its memorandum of decision.

II.

The clear wording of 28 U.S.C. § 2255 precludes the necessity of considering DeLaMotte's claim a second time.

Title 28, U.S.C. § 2255 reads in pertinent part as follows:

The sentencing Court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

Following the mandate of that statute, the District Court properly refused to entertain for a second time the same grounds it had previously rejected in DeLaMotte's first attempt to secure a new trial.

III.

Appellant has failed to produce any evidence that the grand jury which indicted him was misled by the use of hearsay.

Appellant, as found by the District Court, has made no showing whatsoever that the grand jury which indicted him was misled by hearsay testimony. He has therefore not established any basis upon which relief should be granted. *United States v. Esteppa*, 471 F.2d 1132 (2d

Cir. 1972). Furthermore, although he speculates that at the time of indictment the Government could not have obtained a conviction because of a lack of admissible evidence, the sufficiency and competency of evidence supporting an indictment is not open to challenge. *United States v. Calandra*, 414 U.S. 338, 345 (1974). "An indictment . . . if valid on its face, is enough to call for a trial on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956).

Appellant had a fair trial on the merits and his convictions were affirmed on appeal. His claim is completely lacking in merit.

CONCLUSION

For the foregoing reasons, the District Court's dismissal of Appellant's motion to vacate should be affirmed.

Respectfully submitted,

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FOR THE SECOND CIRCUIT

No. 77-2025

GLENN DELAMOTTE,
APPELLANT

VS.

CHARLES E. FENTON,
APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn, New York

That on the 7th day of July, 1977, deponent
upon Glenn DeLaMotte, 01821, U.S. Penitentiary, Post Office Box 1000,
Lewisburg, PA. 17837

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensale

This 7th day of July, 1977

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24-01AM4502760
Commission Expires March 30, 1979

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